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2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons

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Working paper: "Security assurances" submitted to the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons by New Zealand on behalf of Brazil, Egypt, Ireland, Mexico, Sweden and South Africa as members of the New Agenda Coalition

1. INTRODUCTION

The Final Document of the 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons states that:

> "The Conference agrees that legally binding security assurances by the five nuclear-weapon States to the non-nuclear-weapon States to the Treaty on the Non-Proliferation of Nuclear Weapons strengthen the nuclear non-proliferation regime. The Conference calls upon the Preparatory Committee to make recommendations to the 2005 Review Conference on this issue."

Paragraph 8 of the 1995 Principles and Objectives for Nuclear Non-Proliferation and Disarmament states that:

> "Noting United Nations Security Council resolution 984(95), which was adopted unanimously on 11 April 1995, concerning both negative and positive security assurances, further steps should be considered to assure non-nuclear weapon States party to the Treaty against the use or threat of use of nuclear weapons. Theses steps could take the form of an internationally legally binding instrument."

The 1990 Review Conference draft Final Document stated in paragraph 7 under the heading Security Assurances, which, while the document as a whole did not achieve agreement, was consensus language, that:

> "The Conference recognises the need for effective international arrangements, that could be included in an international legally binding instrument, to assure non-nuclear-weapon States parties to the Treaty against the use or threat of use of nuclear weapons. The conclusion of an international instrument providing for such arrangements would strengthen the security of non-nuclear-weapon States parties to the Treaty and offer additional incentives to other non-nuclear-weapon States to

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adhere to the Treaty. Participation of all nuclear-weapon States, including those which are not parties to the Treaty, in such an instrument would contribute to ensuring its maximum effectiveness."

In the Advisory Opinion of the International Court of Justice on the "Legality of the Threat or Use by a State of Nuclear Weapons in Armed Conflict" it was decided unanimously that:

"There is in neither customary nor conventional international law any specific authorisation of the threat or use of nuclear weapons" and that "A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter, and that fails to meet all the requirements of Article 51, is unlawful."

2. PERSPECTIVE

The issue at stake is the granting of legally binding security assurances to the non-nuclear-weapon States parties of the NPT, thereby fulfilling the undertaking which should be given to the States which have voluntarily given up the nuclear-weapons option by becoming parties to the Treaty. The negotiation of legally binding security assurances within the NPT umbrella, as opposed to some other forum, would provide a significant benefit to the Treaty parties and would be seen as an incentive to those who remain outside the NPT. Security assurances rightfully belong to those who have given up the nuclear weapon option as opposed to those who are still keeping their options open. They would strengthen the nuclear non-proliferation regime and confirm the role of the NPT and its indefinite extension.

3. SECURITY ASSURANCES IN THE CONTEXT OF THE NPT

The issue of legally binding security assurances to non-nuclear-weapon States is a complex issue. Key questions that would need to be addressed are:

- Identification of the States providing the security assurances;
- Identification of the beneficiaries of such security assurances;
- The nature and scope of the security assurances being provided;
- Elements that would need to be included in a legally binding instrument on security assurances; and
- In what format such security assurances would be provided.

4. IDENTIFICATION OF THE STATES PROVIDING SECURITY ASSURANCES

The only States in a position to provide security assurances, in that they are legally in a position to possess nuclear weapons and thereby having the capacity to use or threaten to use nuclear weapons, are the nuclear-weapon States. Article IX (3) of the nuclear Non-Proliferation Treaty identifies and defines a nuclear weapon-State as a one "... which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967."

5. IDENTIFICATION OF THE BENEFICIARIES OF SECURITY ASSURANCES

United Nations Security Council Resolution 984(1995), acknowledges the legitimate interest of all non-nuclear-weapon States under the NPT to receive security assurances. This legitimate interest of all of the NPT's non-nuclear-weapon States is further acknowledged in the statements (S/1995/261, S/1995/262, S/1995/263, S/1995/264, S/1995/265) made by each of the nuclear-weapons States on the issue of security assurances.

6. THE NATURE AND SCOPE OF THE SECURITY ASSURANCES BEING PROVIDED

Security assurances comprise of negative and positive assurances. Negative security assurances are those in terms of which there is an undertaking by the nuclear-weapon States not to use or threaten to use nuclear weapons. Positive security assurances are those in terms of which there is an undertaking to provide assistance, in accordance with the United Nations Charter, to a State victim of an act of nuclear-weapons aggression or the object of a threat of such aggression.

A complicating factor in this regard, however, is that all non-nuclear-weapon States are not similar. Many of non-nuclear-weapon States parties to the NPT are members of security arrangements/alliances that rely on the nuclear capability of nuclear-weapon States as an integral part of their defence strategy. It is for this reason that in some of the abovementioned statements of the nuclear-weapon States (France, Russia, United Kingdom, United States) on security assurances, these assurances were qualified by to exclude cases of an invasion or any other attack on a nuclear-weapon State's territory, its armed forces or other troops, its allies or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State.

A further qualification included in some of the 1995 security assurance statements of the nuclear-weapon States (United Kingdom, United States) was that those assurances given emphasised that the assurances were not regarded as applicable if any beneficiary is in material breach of its own non-proliferation and disarmament obligations under the NPT. It is assumed that the material breach referred to here relates to instances where a non-nuclear-weapon-States party to the NPT is acquiring or developing nuclear weapons in contravention with the Treaty.

The negotiation of any internationally legally binding instrument on security assurances would need to take these factors into account. Should such elements be included in the agreement it would mean that, while all non-nuclear weapon States parties to the NPT are beneficiaries of security assurances, these assurances would in certain circumstances be qualified.

7. ELEMENTS THAT WOULD NEED TO BE INCLUDED IN AN INTERNATIONALLY LEGALLY BINDING INSTRUMENT ON SECURITY ASSURANCES

An internationally legally binding instrument would, inter alia, need to include the following elements:

- A general statement of the security assurances which are the subject of the instrument.
- The identification of the States providing the security assurances.
- The identification of the States beneficiary of the security assurances.
- Any qualifications to the security assurances provided for in the instrument.
- Provisions on the mandatory actions to be undertaken by the Security Council where a beneficiary of the security assurances are the subject of a threat of use or use of nuclear weapons.

8. THE FORMAT IN WHICH SECURITY ASSURANCES WOULD BE PROVIDED

Security assurances should be provided in the context of an internationally legally binding instrument, which could either be in the format of a separate agreement reached in the context of the nuclear Non-Proliferation Treaty, or as a protocol to the NPT. The arguments that declarations made by the nuclear-weapon States are sufficient or that these assurances should only be granted in the context of nuclear-weapon-free zones are not valid. The primary undertaking not to aspire to nuclear weapons has been made under the NPT; it is therefore in the context of or as a part of this Treaty that security assurances should also be given.

9. A DRAFT [PROTOCOL] [AGREEMENT]

A draft [Protocol] [Agreement] that demonstrates how security assurances could be encapsulated taking into account the contents of this paper is attached. This draft is attached on the understanding that any such [Protocol] [Agreement] would be the subject of intensive and detailed negotiations that would need to be agreed upon by consensus amongst all the States parties to the NPT. As such, it is further understood that all States parties would reserve, and exercise, the right to make proposals for changes, additions and/or deletions to the text, should it be considered as a possible basis for further work.

Annex

Draft [protocol] [agreement] on the prohibition of the use or threat of use of nuclear weapons against non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons

Preamble

The States party to this [Protocol] [Agreement],

Being also parties to the Treaty on the Non- Proliferation of Nuclear Weapons opened for signature in London, Moscow and Washington on 1 July 1968 (hereinafter called 'the Treaty'),

Convinced that every effort must be made to avoid and avert the danger of nuclear war, to prevent the spread of nuclear weapons, to facilitate international cooperation in the peaceful uses of nuclear energy with particular emphasis on the needs of developing countries, and reaffirming the crucial importance of the Treaty to these efforts, **(Taken from UNSCR 984(1995))**

Taking into consideration the legitimate concern of non-nuclear weapon States that, in conjunction with their adherence to the Treaty, further appropriate measures are undertaken to safeguard their security, **(Taken from UNSCR 984(1995))**

Agreeing that legally binding security assurances by the five nuclear weapon states to the non-nuclear weapon states parties to the Treaty strengthen the nuclear and non-proliferation regime, **(Taken from 2000 NPT Final Document)**

Recognising the legitimate interest of non-nuclear-weapon States parties to the Treaty to receive security assurances, **(Taken from UNSCR 984(1995))**

Reaffirming the need for all States party to the Treaty to comply fully with all their obligations, **(Taken from UNSCR 984(1995))**

Reaffirming also the importance of the Treaty and the need for the full implementation and achievement of all of its provisions,

Reaffirming furthermore that the Board of Governors of the International Atomic Energy Agency (IAEA) is responsible for the consideration of cases of non-compliance with IAEA safeguards agreements, **(IAEA Statute)**

Reaffirming that the total elimination of nuclear weapons is the only absolute guarantee against the use or threat of use of nuclear weapons, **(Taken from 2000 NPT Final Document)**

Recalling the unequivocal undertaking by the nuclear- weapon States, in the Final Document of the 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all the States Parties to the Treaty are committed under Article VI of the Treaty, **(Taken from 2000 NPT Final Document)**

Have decided and hereby agree as follows:

Article I

1. The nuclear-weapon States party to this [Protocol] [Agreement] as defined in terms of Article IX (3) of the Treaty undertake not to use or threaten to use nuclear weapons against a non-nuclear-weapon State party to the Treaty.

2. The States party to this [Protocol] [Agreement] undertake, individually or collectively, to take appropriate measures in response to a request for political, military, technical, medical, scientific or humanitarian assistance from a non-nuclear-weapon State party to the Treaty which is a victim of the use of nuclear weapons. **(Taken from UNSCR 984(1995))**

Article II

1. The security assurance provided for in terms of Article I (1) of this [Protocol] [Agreement] shall be provided by the nuclear-weapon State parties as defined in terms of Article IX (3) of the Treaty.

2. The States receiving the security assurance provided for in terms of Article I (1) shall be non-nuclear-weapon State parties to the Treaty which are in compliance with their obligations under article II of the Treaty. **(Taken from security assurances statements by NWS of April 1995)**

3. The security assurance provided for in terms of Article I (1) shall cease to apply in the event of an invasion or any other armed attack on a nuclear-weapon State's territory, its armed forces or other troops, its allies or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State party to the Treaty in association or alliance with a nuclear-weapon State. **(Taken from security assurances statements by NWS of April 1995)**

Article III

1. The States party to this [Protocol] [Agreement] undertake to cooperate with the Security Council of the United Nations in the event of the use or threat of use of nuclear weapons. The Security Council shall consider measures in conformity with the Charter of the United Nations to address such an act or action. **(Taken from UNSCR 984(1995))**

Article IV

1. This [Protocol] [Agreement] shall be signed and shall be open for signature by any State party to the Treaty. It shall be subject to ratification.

2. This [Protocol] [Agreement] shall enter into force for each State party on the date of deposit of its instrument of ratification.

3. This [Protocol] [Agreement] shall be of unlimited duration and shall remain in force as long as the Treaty is in force.

4. This [Protocol] [Agreement] shall not be subject to reservations.

5. Any amendments to the [Protocol] [Agreement] proposed by a State party shall be carried out in accordance with the procedures of Article VIII (1) and (2) of the Treaty.

6. Each State party to the [Protocol] [Agreement] shall in exercising its national sovereignty have the right to withdraw from the [Protocol] [Agreement] in accordance with the provisions of Article X (1) of the Treaty.

7. The operation and effectiveness of this [Protocol] [Agreement] shall be reviewed at the Review Conferences of the Treaty.

Article V

1. Nothing in this [Protocol] [Agreement] shall be interpreted as in any way limiting or detracting from the obligations of any State under other agreements or treaties on the establishment of nuclear-weapon-free zones.

Article VI

1. This [Protocol] [Agreement], the English, Russian, French, Spanish and Chinese texts of which are equally authentic, shall be deposited in the Archives of the Depository Governments of the Treaty. Duly certified copies of this [Protocol] [Agreement] shall be transmitted by the Depository Governments to the Governments of the signatory States.

2. IN WITNESS WHEREOF the undersigned, duly authorised, have signed this [Protocol] [Agreement].

3. DONE in triplicate, at the cities of London, Moscow and Washington, the ... day of ...